

# **EXHIBIT 2**

**David Kwasniewski, Esq.**

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January 30, 2023

**VIA EMAIL & FIRST-CLASS U.S. MAIL**

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**Re: Defendants' Improper Draft Rule 11 Motion and Withheld Information –  
*B&G Foods North America, Inc. v. Kim Embry, et al., Case No. 2:20-CV-00526-KJM-DB (E.D. Cal.)***

Dear Counsel:

As you know, we represent Plaintiff B&G Foods North America, Inc. in the above matter. We have reviewed the draft Rule 11 motion you served by mail on January 13, 2023. For reasons we have previously noted, the draft motion does not come close to meeting the legal standard for seeking relief under Rule 11 and appears intended for the improper purposes of unnecessarily multiplying these proceedings and presenting unsupported factual arguments to try to influence the Court's ruling on Defendants' motion to dismiss. Should Defendants proceed with filing the motion, B&G Foods will seek its attorneys' fees and costs for having to respond. *See Patelco Credit Union v. Sahni*, 262 F.3d 897, 913 (9th Cir. 2001) ("A party defending a Rule 11 motion need not comply with the separate document and safe harbor provisions when counter-requesting sanctions.").

We write now to address an additional issue raised in the draft which Defendants can easily address. The motion asks the Court to make numerous factual judgments regarding the detailed allegations of the Second Amended Complaint (SAC). It does so, however, without providing any competent evidence substantiating your claims. In specific, the motion attacks the

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SAC's assertions regarding Defendants' failure to file and serve conforming Certificates of Merit (Mot. at 2-3, 7), and failure to preserve critical laboratory data and documents regarding testing of B&G Foods' cookie cake products (*id.* at 3-4). The motion, however, does not include the actual evidence corroborating these assertions, such as the actual correspondence with the Attorney General, including metadata demonstrating the actual date of transmission. In contrast, the SAC explains and appends the evidentiary basis for B&G Foods' assertions, *i.e.*, Defendants' own sworn admissions and deposition testimony, amongst other things.

We accordingly demand that Defendants produce the actual evidence they contend supports the positions raised in their motion, especially those documents which show the date and time of supposed communications with the California Attorney General's office, Defendants' expert(s), and Defendants' laboratory. These documents are encompassed by the following specific requests.

1. All documents Defendants allegedly sent to the California Attorney General (including electronically stored information) as part of defendant Embry's April 22, 2019 Notice of Violation, or its amendment ("April 2019 NOV"), and defendant EHA's October 8, 2020 "Notice of Violation" ("October 2020 NOV") (together, the "NOVs") regarding B&G Foods' alleged violations of Proposition 65, including documents and metadata reflecting the actual transmission date(s) of those materials.

2. Defendants' alleged expert reports and transmission to the Attorney General in connection with the NOVs, including documents and metadata reflecting the actual transmission date(s) of those materials.

3. All documents purporting to establish Defendants' written preservation of evidence instructions to the experts and laboratories used to test B&G Foods' products in connection with the NOVs, including documents and metadata reflecting the actual transmission date(s) of those materials.

Please ensure these documents, which should be readily available if they exist, be produced no later than this coming **Thursday, February, 2, 2023**. To the extent Defendants contend that any of these documents upon which your motion is based somehow contain privileged information or attorney work product, please redact the alleged privileged information in the document(s) in question and produce a privilege log explaining the grounds for such redaction in conformity with the Federal Rules.

We are available to meet and confer regarding these requests and B&G Foods' intended cross-motion for Rule 11 sanctions on **Tuesday, January 31 or Wednesday, February 1, 2023**. The foregoing is not a complete recitation of the issues and deficiencies of Defendants' Draft Motion, and all rights, claims, and defenses are reserved.

Very truly yours,



David Kwasniewski

**From:** [Jake Schulte](#)  
**To:** [Caitlin Shaw](#); [Craig Nicholas](#); [Shaun Markley](#); [Noam Glick](#)  
**Cc:** [Noah Hagey](#); [Forrest Hainline](#); [David Kwasniewski](#); [Robert Petraglia](#); [Amanda Lindsey](#); [Janani Natarajan](#)  
**Subject:** RE: B&G Foods North America, Inc. v. Kim Embry, et al., Case No. 2:20-CV-00526-KJM-DB (E.D. Cal.)  
**Date:** Thursday, February 2, 2023 10:31:51 AM

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\*\*\* EXTERNAL MESSAGE \*\*\*

David,

Defendants have several concerns with B&G's unwarranted demand for documents and its unilateral deadline regarding same. To start, you provide no authority suggesting Defendants must produce the requested documents. Indeed, such a production would appear contrary to one of the main inquiries regarding Defendants' Rule 11 motion – i.e., whether *B&G (or its attorneys)* conducted a reasonable and competent investigation into its allegations *prior to* filing the operative complaint. B&G's 11<sup>th</sup> hour request appears to be designed as a "setup" to argue in opposition papers that Defendants are hiding something if they don't produce documents.

This week has been extremely busy for Defendants' firms, including finalizing a class certification motion among other time sensitive projects. B&G's after-hours letter on Monday (1/30) unilaterally demands that Defendants' counsel drop everything they're doing, search for years-old documents, and produce them by today (2/2). That's unreasonable. Also, your letter only provided the dates of Tuesday (1/31) and Wednesday (2/1) to meet and confer about these requests and B&G's intended cross-motion for Rule 11 sanctions. This too is an unreasonable timeline. Notwithstanding the foregoing, I'm available tomorrow after 1pm for a meet and confer call. If that works for you, please send a calendar invite with a dial-in number.

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**From:** Caitlin Shaw <[Shaw@braunhagey.com](mailto:Shaw@braunhagey.com)>  
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**Subject:** B&G Foods North America, Inc. v. Kim Embry, et al., Case No. 2:20-CV-00526-KJM-DB (E.D.

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[External Email]

Counsel,

Attached please find correspondence pertaining to the above-captioned matter.

Regards,

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